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FIRST POINT 15

The fact finding of the trial court that the Steamship Company had made due delivery of the sardine shipment to the Wharf Company is sufficiently supported by evidence.

SECOND POINT 19

The authorities support the finding that the Steamship Company made due delivery and the conclusion that it was relieved from liability.

THIRD POINT 25

The circumstances mentioned by the Wharf Company and the Railroad Company do not impair the finding of the courts below that delivery was made by the Steamship Company.

I. Concerning wharfage.
II. Concerning diversion.
III. Concerning policing.
IV. Concerning salvaging.
V. Concerning notice of readiness.

FOURTH POINT 29

The Wharf Company in receiving delivery from the Steamship Company acted either as the agent of, or as a sub-contractor for, the Railroad Company and the Steamship Company was by such delivery relieved of further responsibility in respect of the shipment.

LAST POINT 31

It is respectfully submitted that the decision of the Supreme Court of Texas should be affirmed with costs in so far as it relieves the Steamship Company from liability.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1931

No. 411

GALVESTON WHARF COMPANY, *et al.*
Petitioners

AGAINST

GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY, *et al.*
Respondents

BRIEF FOR RESPONDENT MALLORY STEAMSHIP COMPANY

TRIAL COURT FINDINGS

The trial court found as a fact (trial by jury having been waived) that the Steamship Company had made delivery of the shipment to the Wharf Company. See "Findings of fact and conclusions of law", R. 21-29. This finding was not disturbed, but was affirmed in the Court of Civil Appeals and in the two hearings in the Supreme Court of Texas. The Supreme Court of Texas appears to have regarded the fact findings of the trial court as binding on the several Appellate Courts, for it said (R. 155):

"If the Court of Civil Appeals undertook to substitute its findings of fact for the findings of fact made by the trial court and render final judgment thereon, it would not be authorized to do so, if there was any evidence in the record to sustain the finding made by the trial court."

It also said (R. 148):

"The Wharf Company contends that it should be held under the evidence introduced that, as a matter of law, no delivery of the shipment in controversy was made by the Steamship Company to the Wharf Company. To this contention we cannot agree. We think the evidence raises a fact issue to be determined and the trial court found that a delivery had been made by the Steamship Company to the Wharf Company.

Under the state of the record, we do not think it can be said, as a matter of law, that there was no evidence of any probative force to sustain the findings of the trial court. It can only become a question of law when the facts and circumstances are such that but one reasonable conclusion can be drawn therefrom."

We respectfully submit that the fact of delivery by the Steamship Company to the Wharf Company as found by the trial court and thereafter three times affirmed stands in this Court, and is not subject to further review.

On the facts thus definitely found the judgment below is correct as to the Steamship Company, relieving it from liability. It is not the concern of the Steamship Company whether the judgment is correct in imposing liability on the Wharf Company as distinguished from the Railway Company.

Plaintiff Adopts Wharf Company's Petition

We note that the plaintiff, American Grocery Company, adopts the petition of Galveston Wharf Company and brief in support thereof (Petition, p. 12, Brief, p. 19). In the Court of Civil Appeals plaintiff prayed the court "to affirm the judgment of the trial court", and alternatively for judgment against the other defendants (R. 38). The petition prays (p. 12) for reversal of the judgment of the Supreme Court of Texas (R. 160) affirming the judgment

of the Trial Court (R. 19), which awarded the plaintiff $5,376.25 against the Wharf Company, and dismissed the complaint as against the Steamship Company and the Railroad Company (R. 20). Thus the plaintiff would appear to have consented here to reversal of the money judgment in its favor against the Wharf Company, but plaintiff has not petitioned in its own right for reversal of those portions of the judgment below which dismissed its claim as against either the Railroad Company or the Steamship Company. The Wharf Company is necessarily only interested in securing reversal as against itself of the plaintiff's recovery against it, not in imposing liability in favor of plaintiff against the other defendants. It may be a question whether adoption by the plaintiff of the Wharf Company's petition benefits the plaintiff, or enables it to secure any relief transcending that secured by the Wharf Company. The consequence of this position is possibly like that stated in *Federal Trade Commission* v. *Pacific Paper Assn.*, 273 U. S. 52, 66.

Errors in Brief for Railway Company

I. Brief for the Railway Company is incorrect in stating (p. 2) that one of the piers of the Galveston Wharf Company "is leased to the respondent Mallory Steamship Company for its exclusive use". The agreement of July 1, 1914, between the Wharf Company and the Steamship Company (R. 81-86) shows that the Steamship Company was not to have exclusive use of the pier, and the evidence shows that it did not in fact have such. We now refer briefly to this evidence.

The Steamship Company's Dock Superintendent testified that the Wharf Company also used the wharves for other purposes besides handling shipments for the Mallory Line (R. 45). The Steamship Company, Wharf Company and

Railroad Company each had a set of clerks on the dock and the Steamship Company and Wharf Company each had a force of laborers (R. 53). The Wharf Company and Steamship Company had adjoining offices on the wharf (R. 53). The Wharf Company had an average force of 150 laborers there (R. 72).

The Wharf Company's General Manager testified (R. 75):

"The property is ours, but it is allocated to the Mallory Line. Our forces worked there in the performance of the duties for the account of the rail lines, in picking up this stuff and loading into cars and unloading from cars, and placing in their northbound berths for loading into their steamers. Our clerks have offices there. We have representatives and clerks on every pier."

The Wharf Company's railroad tracks were on the pier and the services it performed for the railroads in receiving and loading the cars were being performed by it on the pier. The pier was not therefore in the exclusive occupation of either the Steamship Company or Wharf Company, but they were occupying and using the same for their respective purposes (R. 48 and Ex. B, R. 80 L).

The Railroad Company also had an inspector on the pier whose duty it was to inspect the shipments when landed and if any were damaged to supervise putting the same in order by the Steamship Company and stamp his O. K. thereon to indicate that they were ready to go forward. (R. 52-53, 78).

II. Brief for the Railway Company further errs in stating (p. 2):

"Carload shipments when taken from the vessel were not placed in any designated portion of the wharf, but were placed at the most convenient point to the place they happened to be stowed in the particular vessel."

It was the understanding and practice of many years that carload shipments should be placed by the Steamship Company in piles in a designated territory on the wharf convenient to the empty cars placed there on tracks for loading the same; and that after a shipment had been so placed and any "out of order" packages put in condition by the Steamship Company and stamped O. K. by the Railroad Company's inspector, the Steamship Company was through and had nothing further to do with or control over the shipment; the Wharf Company then without further permission, notice or action on the part of the Steamship Company picked up and loaded the same into cars as found convenient in the course of the work of loading out the steamer's cargo. The Wharf Company had a force of 150 men on the Wharf to do this work and it was generally begun as soon as there was sufficient cargo out of the ship to start on.

The Steamship Company's dock superintendent testified (R. 44):

"Our force unloaded the vessel and put the shipments at convenient places on the wharves as designated. Assuming that there are no broken packages, we do no further handling of a shipment. The Galveston Wharf Company does. Relative to the time when we have placed our shipment at the designated places on the wharves, so far as the Mallory Line is concerned, the Wharf Company may load it out immediately."

And at R. 45:

"In the usual and customary handling of freight over the wharf from the vessel, after we have placed a shipment at the designated point on the wharf, the only thing else, if anything, the Mallory Line has to do with the shipment is to repair the bad order packages. Assuming that there are no bad order packages, we have nothing further to do with it."

Further, at R. 50:

"The Mallory Line has no control whatever over the employees of the Wharf Company who handle these shipments from the place on the dock to the car. We give them no directions."

The Steamship Company's chief dock clerk testified that (R. 51-52):

"I remember this shipment of sardines. It was unloaded from the boat that day and placed on the wharf. As you come out of the conveyor, it was placed south of the gang-way about 60 feet from the conveyor, I would judge. As you come out of the ship, you go west, and it was placed south of the gang-way, where we generally place car-load shipments on the dock. We have an electric conveyor. As soon as the shipment comes off the boat, it gets on that and is automatically carried to the designated place. This shipment was so placed on that day. Trucks came off the conveyor and took it to the pile and unloaded it in a pile on the dock. I remember it was on dock in the early afternoon. I could not tell the exact time. I judged it was before 2:00 o'clock. This was a car-load shipment. After we placed the shipment in the designated territory, that is all we have to do with it. If we have broken cases, we set them aside, and the Mallory Line coopers come along and put them into condition, and we are through with it, and it is ready for the Wharf Company to load out. The Wharf Company does the loading of the cars from the place we put it. We have no voice in saying when they shall do that. They do that at their own pleasure and convenience."

The Wharf Company's general manager was in full accord with the foregoing, and testified (R. 67-68):

"As to a space being assigned on the wharf where they separate the carloads from LCL, I will say that that is attempted. There is an imaginary line where they attempt to deposit the checked freight, *make such delivery,* [Italics ours] and the carloads are usually placed by the Mallory to their best advantage. When I say that, the Mallory of course knows that it is more expensive to truck a shipment a longer distance, and they will make a short cut and cut

that down as much as possible. They have electric conveyers but the custom there is to place the cargo in certain places as much as possible. There is, in a general way at least, a kind of assigned territory there for different rail lines. The cars are spotted opposite in the same manner. * * * Our forces are at liberty to begin the loading as soon as the freight is put on the wharf, but the practice is to wait until there is a sufficient amount deposited there to keep the labor busy. Otherwise, it is not a paying investment. It is our privilege to begin loading as soon as it is put on the wharf, unless a hold order is put on some specific shipment which happens only occasionally. So that as soon as freights were deposited on the wharf by the forces of the Mallory, there was nothing to prevent our forces from immediately picking it up and trucking it to the cars. That was all left to the judgment and discretion of the Galveston Wharf Company's supervisor of forces on the docks. It was not a matter within the control of the Mallory Line. * * * The Railroad Company knew of freights that were coming routed by their lines and they were supposed to have cars in there. That matter is handled in advance. Our men, with our yard office, orders for this equipment. If we have not the cars in the yard they are delivered to us by the interested Bay Line and we spot this equipment in accordance with the instructions of the dock department. We try to spot these cars that take out SP freight on the tracks that are most convenient to pick up the freight that goes out on that line. On the day of the fire these cars had been spotted in the usual manner and the cars were there. As the freights were placed on the wharf by the Mallory Line it was purely a matter of the Wharf Company to determine just how and when to load the particular shipment in the usual manner. I have testified that we tried to give preference to perishable and likewise to freights that we had noticed were regarded as rush orders, so that if we had a shipment that was designated as a rush shipment we would endeavor to give that prior good handling to insure dispatch and satisfy customers."

He further testified (R. 70):

"It is the Mallory Line's usual performance to deposit it on the floor and it is picked up and loaded into the cars by the Galveston Wharf Company. As to the particular time it is picked up that is wholly in the control of the Wharf Company. After it had been placed and it was ok'd to go we

were at liberty to pick it up and send it forward at any time we got ready and it was not necessary for us to ask permission of the Mallory Line about it."

He also said (R. 72):

"I think the record shows that on the day of the fire we had about 150 men at work. That was about the average force. We used them right along because they had become efficient in the service and knew what was expected of them."

III. Brief for the Railway Company is further inadequate in its description (p. 3) of the procedure as to checking and receipt. The matter of receipts was dealt with in Finding XI of the trial Court (R. 27).

On the subject of check of the shipments the Steamship Company's dock superintendent testified that in unloading from the ship their men checked the shipment as to identification marks, location on the ship and its place on the dock (R. 44); that the carload shipments were checked from the piles into the cars by the Wharf Company and "not by the Mallory Line on that date" (R. 49); that the LCL shipments are checked by the Steamship Company to the pile (R. 51). He further testified (R. 55) that when the Wharf Company gets ready to pick up a carload "they take a copy of the billing, accompanied by a clerk of the Mallory, and check those carload lots as they pick them up * * *." "As to whether we depend on the Wharf Company to check we place them on the dock and consider that our delivery". Apparently this does not mean that there was a joint check in view of this witness' previous statement.

The general manager of the Wharf Company testified (R. 58):

"The general practice in vogue and it has been that way for years, is that the Mallory Line checked the LCL shipments and also the carloads in part what they can as it is

unloaded from the ship. Now that is put on the piers in certain piles and it is checked up from these various and sundry piles by the Wharf Company's forces and checked from such piles by our check clerks, and with reference to the carloads, they are also checked when they are lifted from the piles by our check clerks. In some instances the check is made *after the commodities are loaded in the cars,* [Italics ours] that being dependent upon the nature of the cargo permitting such practice."

And at R. 60:

"After we get the billing and it shows so many sardines being unloaded we do not take that billing as evidence of what we are going to pick up and take to the GH. & SA. We make a check on carload lots. That check is made when it is loaded. At the time of its loading in the cars and the same is true of the LCL."

No reference is made by him to a *joint* check, or a check by the Steamship Company from the piles to the cars. There would hardly be any occasion for joint check.

On the subject of a receipt from the Wharf Company for goods loaded, it appears that a receipt would be given by the Wharf Company in behalf of the railroad as of the date, but not of the hour, when the goods were lifted from the pile for loading into the car (Finding XI, R. 27, 55). The Petition is not correct in referring (p. 4) to receipt "as of the date *and hour*" of picking up the shipment. The reference to the Record does not support this. On the contrary, the evidence at R. 55-56 is:

"The receipt would not show the time the Galveston Wharf Company took the freight off the wharf and took it to the cars. It would show the date it loaded it out * * * ."

The receipt was never a condition of the loading of the shipments into the cars, however, and would not be received by the Steamship Company until some days later. It was for the purpose of a record of what was in the pile in the case of loss and damage claims at destination (R. 44-45, 50, 70).

The whole matter of checking, however, is relatively unimportant. It is evident that the purpose was to determine what was in the pile, the assumption being that that was what the Steamship Company had delivered. It even appears that the check was sometimes made by the Wharf Company in the car after the goods were loaded in the car, which would concededly be after delivery had been made, and that the Railroad receipt would then be based on the check after loading into cars (R. 64). It was obviously a practice of convenience having no particular reference to the technical question of delivery. Receipts were never received by the Steamship Company until long after the cars had been loaded out and were gone.

IV. It is not correct, as stated by brief for the Railroad Company (p. 5) that the Steamship Company "reserved the right to divert the shipment from one railroad to another at any time prior to the actual loading into the cars". We shall refer to this later.

STATEMENT OF FACTS

In addition to the facts necessarily stated in the foregoing comment, there are other facts which are pertinent and essential to proper understanding of this case.

WHARF AGREEMENT

There was an agreement (sometimes referred to in the testimony as a lease) in effect between the Steamship Company and the Wharf Company (Ex. C. R. 81) by which the Wharf Company, in consideration of an annual payment of $5,000 by the Steamship Company, agreed (R. 82) to

"permit and allow the Steamship Company and its affiliated lines to berth its and their vessels alongside of piers numbered 23, 24, 25, 26 and 27 in the City of Galveston, as now constructed, and to load and unload its and their vessels from and into the sheds and warehouses on said piers and to have the use of all sheds, warehouses and other structures upon or appurtenant to said piers or space and any and all improvements and additions thereto".

This arrangement was provided to be subject to the following conditions (R. 82-83):

"In the event at any time * * * the berthing and shed capacity adjacent to and on said piers * * * are not in use to their full capacities by the Steamship Company, or its affiliated lines, the Wharf Company retains and is hereby given the right to permit and allow any other person or corporation to use so much of said berthing and warehouse space as is not in use by the Steamship Company, or its affiliated lines".

"It is distinctly agreed and understood that the payment of the said sum of Five Thousand and 00/100 Dollars ($5,000) per annum hereinabove provided for is to be made as shed hire, and in addition thereto, the Wharf Company shall be entitled to collect from the Steamship Company and the Steamship Company will promptly pay to the Wharf

Company the regular wharfage and other rates and charges specified in the tariffs published or hereafter to be published by the Wharf Company for all goods, commodities, wares and freight loaded into or out of vessels of the Steamship Company, or its affiliated lines, which shall berth at said piers, and will comply with all rules shown in such tariffs".

The Wharf Company agreed to keep the piers, sheds, etc., which were the subject of the contract, in good repair and condition and it was agreed (R. 83) that the Wharf Company

"shall in no way be responsible for any loss or damage to any goods or cargoes handled over and through said wharves, sheds and warehouses, unless same be caused by defect in roof of warehouses, * * *"

The trial court held that the Steamship Company did not by this "assume responsibility for the loss of goods which were * * * in the possession of the Wharf Company" (R. 29).

"The salaries of sufficient police watchmen to protect the property hereinabove described" were to be paid by the Steamship Company and a *pro rata* of the expense of one day and one night police sergeant (R. 84).

In addition to its through traffic which the Wharf Company received and loaded out for the railroads the Steamship Company handled over the wharves its local traffic which the Wharf Company did not handle (R. 64).

WAYBILL

The shipment of sardines arrived at Galveston by the steamship *Concho* of the Mallory Steamship Company early in the morning of January 13, 1926, and the vessel was berthed at Pier 24, began to discharge at about 8:30 A. M. and finished at 5:30 P. M.

About two days previous to the arrival of the *Concho* the waybill (Ex. E, R. 86 CC) giving all requisite information as to the shipment of sardines, was furnished to the Wharf Company and by the latter to the Railroad Company so that the Railroad Company and the Wharf Company were advised that the shipment of sardines was on the steamer routed over the Railroad Company's line to El Paso, Texas, with the weights and quantities and other particulars. In consequence, the evening before arrival of the *Concho* empty cars for this and certain other shipments routed to go out over the Railroad Company's line were furnished by the Railroad Company and hauled down by the Wharf Company and spotted on the wharf at a point convenient for loading the cargo when discharged from the steamer (R. 42, 53, 67).

Loading other shipments into cars

During the day of January 13 as soon as sufficient cargo was out the Wharf Company began picking up the placed shipments and loading them into the cars, employing 150 men on this work (R. 72). This was the regular practice (R. 59).

The ship was fully discharged by 5:30 P. M. and out of the 1081 tons discharged and placed in the designated territory all but 379 tons were lifted and loaded by the Wharf Company as a matter of course without any notice, request or other action on the part of the Steamship Company (R. 43, 44). There were two other carloads routed by the same Railroad Company which were placed on the wharf in approximately the same location as the sardines and about the same time. These were picked up and loaded by the Wharf Com-

pany as a matter of course without any permission of the Steamship Company (R. 45, 47). When asked why the third car was not loaded the general manager for the Wharf Company answered, "It just so happened, I guess" (R. 74).

The Steamship Company's witnesses testified that the *Concho* had only two-thirds of a cargo, 1081 tons out of an an average cargo of 1500 tons (R. 44, 50) and that the sardines could and should have been loaded out the same day if the Wharf Company's forces had not been diverted to other work (R. 44).

This shipment of sardines was discharged from the ship and placed in a designated territory between 2 and 3 P. M. January 13. A few cases in bad order were put in good order under the supervision of the railroad inspector and were stamped O. K. by him before 4 o'clock of that day (R. 43, 46, 49, 52, 53).

Location of the sardine shipment on the wharf and that of the Railroad Company's cars was pointed out on the sketch, Ex. B, by the Steamship Company's dock superintendent (R. 48, 80 L).

FIRST POINT

THE FACT FINDING OF THE TRIAL COURT THAT THE STEAMSHIP COMPANY HAD MADE DUE DELIVERY OF THE SARDINE SHIPMENT TO THE WHARF COMPANY IS SUFFICIENTLY SUPPORTED BY EVIDENCE.

Unless it can be said that there was no evidence whatever to support the trial court's finding that the Steamship Company delivered the shipment to the Wharf Company, the contentions put forward here by the petitioner (Wharf Company) and by the Railroad Company do not raise a question for review by this Court so far as the Steamship Company is concerned.

In *Dooley* v. *Pease,* 180 U. S. 126, 131-132, this Court said:

"Where a case is tried by the court, a jury having been waived, its findings upon questions of fact are conclusive in the courts of review, it matters not how convincing the argument that upon the evidence the findings should have been different. Stanley *v.* Supervisors, 121 U. S. 547.

"Errors alleged in the findings of the court are not subject to revision by the Circuit Court of Appeals, or by this court, if there was any evidence upon which such findings could be made."

In *U. S.* v. *U. S. F. & G. Co.,* 236 U. S. 512, 527, this Court said:

"The findings have the same effect as the verdict of a jury, and this court does not revise them, but merely determines whether they support the judgment."

The finding of the trial court that the Steamship Company had made delivery was affirmed three times on appeal in the Texas courts, a circumstance which would be of great weight here even if the findings of fact of the trial court were open

to review—which they are not in a common law case as distinguished from an equity case. See *Baker* v. *Schofield*, 243 U. S. 114, 118.

A finding of fact which can be supported by permissible inferences from the evidence will not be disturbed on appeal simply because different inferences could have been drawn from the same evidence. This was recognized by the court below (R. 148-149) and is unquestionable law. In *Jones* v. *Clark*, 272 Mass. 146, 149, the Supreme Court of Massachusetts recently said:

"We cannot review the inferences drawn by the trial judge. The only question in this connection is whether the inference was permissible; it is not whether we should draw the same inference."

And in *Aronson* v. *Pearson*, 199 Cal. 295, 303, it is said:

"But where the evidence is sufficient to support conflicting inferences the finding of the trial court either way thereon is conclusive on appeal."

There was undisputed testimony on the trial to the effect that the shipment had been placed in the territory where, according to the established practice of long standing, the wharf company would lift the same without further action on the part of the Steamship Company, whenever it suited the convenience of the Wharf Company forces in the course of loading the steamer's cargo into cars. The shipment was stamped with the o. k. of the Railroad Company's inspector as ready to go forward before 4 P. M. January 13 and a railroad car had been placed there the night before to load this very shipment. Two other carload shipments for the Railroad Company placed in the same territory near the sardines about the same time were loaded without any notice or further action on the part of the Steamship Company.

The Wharf Company's forces worked until 7 P. M. in loading the cargo, and would by that time have loaded this cargo also without any action on the part of the Steamship Company if in the exercise of their discretion they had not preferred other shipments or had not been diverted to other work. It was the Wharf Company's general manager who testified (R. 67-68):

"They have electric conveyors, but the custom there is to place the cargo in certain places as much as possible. There is, in a general way at least, a kind of an assigned territory there for different rail lines. The cars are spotted opposite in the same manner. The night before this boat got to Galveston both the Galveston Wharf Company and the G. H. & S. A. should have known from the billing that there was a car of sardines on that boat destined for El Paso routed over the G. H. & S. A. or S. P. Our forces are at liberty to begin the loading as soon as the freight is put on the wharf, but the practice is to wait until there is a sufficient amount deposited there to keep the labor busy. Otherwise it is not a paying investment. It is our privilege to begin loading as soon as it is put on the wharf, unless a hold order is put on some specific shipment, which happens only occasionally. So that as soon as freights were deposited on the wharf by the forces of the Mallory, there was nothing to prevent our forces from immediately picking it up and trucking it to the cars. That was all left to the judgment and discretion of the Galveston Wharf Company's supervisor of forces on the docks. It was not a matter within the control of the Mallory Line."

* * * * * * *

"On the day of the fire these cars had been spotted in the usual manner and the cars were there. As the freights were placed on the wharf by the Mallory Line, it was purely a matter of the Wharf Company to determine just how and when to load the particular shipment in the usual manner."

And he testified further (R. 70):

"After this shipment had been placed at the designated point, you ask what else in the further handling of that shipment was to be done by the Mallory. There was the coopering

feature. After this had been o.k.'d and it was all right in every respect and deposited there by the Mallory Line, the next thing in order would have been the loading into the cars by our forces if it was ready to go. It is the Mallory Line's usual performance to deposit it on the floor, and it is picked up and loaded into the cars by the Galveston Wharf Company. As to the particular time it is picked up, that is wholly in control of the Wharf Company. After it had been placed and was o.k.'d to go we were at liberty to pick it up and send it forward at any time we got ready, and it was not necessary for us to ask permission of the Mallory Line about it."

* * * * * * *

"The Mallory Line never has required so far as that boat is concerned for us to give them a receipt for what we picked up before we loaded it. If they had requested it, I am sure they would not have got it."

It was testified by the Steamship Company's Chief Dock Clerk that the shipment after being placed in the territory was reconditioned as to a few damaged packages and stamped o.k. by the Railroad Company's inspector as ready to go forward, and that this was before four o'clock on the same day (R. 52, 53).

The evidence just referred to taken in connection with other evidence mentioned in the earlier part of this brief demonstrates ample support for the findings of the trial court in respect of delivery by the Steamship Company.

SECOND POINT

THE AUTHORITIES SUPPORT THE FINDING THAT THE STEAMSHIP COMPANY MADE DUE DELIVERY AND THE CONCLUSION THAT IT WAS RELIEVED FROM LIABILITY.

The facts and circumstances of the case at bar in respect of the matter of delivery by the Steamship Company do not differ in substance from those which appeared in *Pratt* v. *Railway Co.*, 95 U. S. 43. There the Grand Trunk occupied a section in the Michigan Central depot at Detroit into which it unloaded freight arriving by its line. It employed men who checked the freight coming into this section. It paid the Michigan Central for the use of this section a fixed compensation per hundred weight, covering the unloading by Michigan Central employees in a particular place in such section of its incoming freight destined to go out over the Michigan Central, and from this spot such freight was loaded into the Michigan Central cars by the latter's employees, when they were ready to load it. After the goods were placed in such special place they were not further handled by the Grand Trunk. When the Michigan Central agent observed goods deposited in said section occupied by the Grand Trunk destined over the Michigan Central road, he would call upon the Grand Trunk agent and inspect the way bill and from the information thus obtained would prepare a Michigan Central way bill. The goods there in question arrived on the Grand Trunk line and were deposited at the place in the Grand Trunk's section at the place for goods destined out over the Michigan Central. The Grand Trunk's employees

checked them into such place from the Grand Trunk way bill. This Court said (46):

"We are all of the opinion that these acts constituted a complete delivery of the goods to the Michigan Central Company by which the liability of the Grand Trunk Company was terminated.

"1. They were placed within the control of the agents of the Michigan Company.

"2. They were deposited by the one party and received by the other for transportation, the deposit being an accessory merely to such transportation.

"3. No further orders or directions from the Grand Trunk Company were expected by the receiving party. Except for the occurrence of the fire, the goods would have been loaded into the cars of the Michigan Central Company, and forwarded, without further action of the Grand Trunk Company.

"4. Under the arrangement between the parties the presence of the goods in the precise locality agreed upon, and the marks upon them, P. & F., St. Louis, were sufficient notice that they were there for transportation over the Michigan road toward the City of St. Louis; and such was the understanding of both parties."

This Court cited *Merriam* v. *Hartford & New Haven Railroad Co.*, 20 Conn. 354, and *Converse* v. *Norwich & New York Transportation Co.*, 33 Conn. 166, as "strong decisions".

In *Merriam* v. *Hartford & New Haven Railroad Company*, 20 Conn. 354, it was held that if a practice by a carrier is shown to receive property for transportation when deposited at a particular place without express notice, such deposit amounts to notice and is a delivery.

In *Converse* v. *Norwich & New York Transportation Company*, 33 Conn. 166, a through shipment from New York to Stafford, Connecticut, was transported by defendant to New London and there discharged into a depot building on the wharf where it was destroyed by fire. The tracks of the New

London Northern Railway Company, the connecting carrier, led from the wharf, and the goods were deposited by the defendant in the usual place of deposit for freight brought by them destined for points on the line of the railroad. The practice was for the defendant's agents to make out a way bill and hand it to the agent of the railroad and for the latter to load the freight on board their cars, taking it from the place where the defendants were accustomed to deposit it and checking each article upon the way bill as it was taken up. If any article described in the way bill was in bad order, the defendants were expected to put it in good condition. The depot was built by the railroad and the privilege of using the same leased to the defendant under an agreement for joint traffic.

The Court held that by the deposit there was a delivery to the railroad, saying (pp. 182-3):

"It is clear then that both the transportation company and the northern road contemplated that the placing of freight by either intended for the other upon that platform was all that either was to do by way of delivery of their freight to each other; that they did not contemplate such placing as an intermediate deposit, to be watched by the party depositing, or as a joint deposit, at the joint risk and in the joint possession of both; but that they relied upon the enclosure as a protection, and considered the placing of the freight in the usual spot upon the platform a delivery.

The minor facts respecting the time and manner of delivering the way-bills—the examination of the freight, and checking of the way-bills to be sure that all had been delivered—the proportionate extent and the manner of their joint use and possession of the depot—the looking up and paying for missing goods—and the practice of letting the Saturday freight remain on the platform until Monday morning—are only material as they bear upon the great question, namely, what was it agreed and understood between the defendants and the northern road should constitute a delivery from one to the other."

Washburn Crosby Co. v. *Boston & Albany Railroad,* 180 Mass. 252, involved the question of constructive delivery by that railroad to a connecting steamship company. The wharf belonged to the railroad but a portion was used and occupied for the purpose of receiving goods by the steamship company, whose superintendent had an office there. A shipment of flour was placed on this part of the wharf. The defendant had given the steamship company notice by letter that the unloading of steamship freight at that place constituted delivery by defendant and therefore it assumed no responsibility. Holmes, *C. J.,* said (pp. 255-256):

"The plaintiff also adverts to the fact that the bags of flour were counted before being put on board the steamer as something remaining to be done before delivery was complete. But this last matter may be dismissed, as at least it might have been found to be a precaution taken by the steamship company solely for its own satisfaction after delivery to it. The bags were counted by the defendant when they were taken from the car to the wharf."

* * * * * * *

"If then, as might have been found, it was understood in advance that as soon as goods were left on the wharf by the railroad the steamship company was free to take them at its pleasure and that it was expected to take notice of their presence and assume responsibility for them without more special notification, the deposit of the flour on the wharf was an actual delivery without more."

In *Aetna Insurance Co.* v. *Wheeler,* 49 N. Y. 616, a through shipment under a joint rate by water line connecting with a railroad line was discharged by the water line upon its wharf and carried to a warehouse alongside the railroad's tracks by a concern whose services were paid for jointly by the two carriers. Notice of such deposit in the warehouse was thereupon given to the railroad. When the railroad was ready to forward the goods, its cars were run alongside the

warehouse and loaded. The Court referred to *Coyle* v. *Western Railroad Corporation*, 47 Barbour, 152, where it was held that placing barrels in the usual place of delivery to a forwarder for transportation, although the same were not in the particular instance counted, tallied or receipted for as usual between the parties, placed them in possession of the forwarder as a common carrier. The Court also referred to *Converse* v. *The Norwich Transportation Co.* (cited *supra*) and said (p. 622):

"In the present case, the flour was not only deposited in the usual place, but notice was given to the defendants, who entered it upon their books. From this time it must be held to have been in the possession of the defendants as common carriers."

It was also said that the fact that the key was in the possession of the water line was not material as there was no pretense, "but that property placed where this was, was taken and transported by defendant at its pleasure" (p. 622).

In *E. L. & R. R. Railway Co.* v. *J. D. Hall*, 64 Texas, 615, where it was alleged that bales of cotton which were destroyed in a fire had been delivered to the railroad, it appeared that the cotton had been delivered on the platform and a portion thereof had been tagged for shipment under an order from the station agent to tag and load the whole, and a part had been loaded into cars. It was said that the numbering and counting of the cotton to be done before acceptance might nevertheless be postponed by the agent until after acceptance. The Court said (p. 620):

"The question was, had the defendant accepted the cotton—not had all been done that ought to have preceded acceptance".

It was held that the question of delivery was a question of fact for the jury.

In *Texas & Pacific Railway Co.* v. *Clayton*, 173 U. S. 348 (relied on at page 10 of the Petition for Certiorari), where the goods were deposited upon a wharf belonging to the railroad company, but from which the steamship company was obligated by contract to take the same within a reasonable time, it appeared that at the time the particular lots to be loaded on the steamer were being pointed out by the railroad company's employee and being loaded, the goods remaining on the wharf were destroyed by fire. The bill of lading contained the provision that the carrier in whose "actual custody" the goods should be at the time of loss should "alone" be liable therefor. This Court said as to the clause in that bill of lading (p. 355):

"The first thought suggested by these clauses, taken together, is that the parties recognized the possibility that it might be often difficult to determine what, as between carriers, in view of their relations to each other, would constitute a sufficient delivery to the connecting carrier. And in order to meet that difficulty the clause relating to actual custody was added, so as to indicate that the delivery intended, so far as liability to the shipper for loss was concerned, was not a constructive one, but such a delivery as involved actual custody of the cotton by the connecting carrier."

It was held that "actual custody" meant the physical possession of the goods. This Court said (p. 362):

"It is the clause of that character in the bill of lading now in suit which makes the judgment in the *Pratt, Converse* and *Merriam cases* inapplicable to the present case."

THIRD POINT

THE CIRCUMSTANCES MENTIONED BY THE WHARF COMPANY AND THE RAILROAD COMPANY DO NOT IMPAIR THE FINDING OF THE COURTS BELOW THAT DELIVERY WAS MADE BY THE STEAMSHIP COMPANY.

I. CONCERNING WHARFAGE

It is said that the Wharf Company makes a tariff wharfage charge to the vessel, and that the only service rendered the railroads for which the Wharf Company is paid is the lifting and loading of the cargo and switching to the railroad connection, and that therefore the Wharf Company cannot be deemed to receive delivery of any shipment until it is actually lifted by it to load into the cars.

The wharfage charge against the vessel according to the tariff is a single charge of so much per hundred weight or other unit of cargo discharged on the wharf, not a per diem charge, and is earned when the cargo is placed on the dock in the designated territory for the purpose of being lifted and loaded into cars by the Wharf Company. The Steamship Company furnished a statement of the cargo tonnage and the charge was on that for the use of the pier (R. 60). It was the duty of the Railroad Company under the through traffic arrangements and the bill of lading to receive and continue the transit of the shipment. It was a shipment in transit and not a shipment on dock awaiting delivery to a consignee. In order to perform its service to the Railroad Company, of lifting and loading the cargo, possession by the Wharf Company was first necessary. Having

taken or assumed possession it was in order for the Wharf Company to defer lifting and loading until such time as should meet its convenience. Its forces had been put to work on loading into cars the cargo discharged from the steamer and were proceeding generally with the execution of such task, selecting shipments at their convenience, all equally at their disposal, without any further action of the Steamship Company. The inspector of the Railroad Company had already placed his O. K. stamp on the shipment as ready to go, which was notice thereof to the Wharf Company. There is no inference from the tariff that possession had not been taken by the Wharf Company for the purpose of performing its service under the tariff as convenient. There was in the circumstances here no inference of an intermediate state of control after the shipment was placed in the designated territory and stamped O. K. by the Railroad representative.

II. Concerning Diversion

It is also said that the testimony as to diversion or reconsignment negatives delivery. After the billing or way bill had been received by the Steamship Company and turned over to the Wharf Company and by them to the Railroad, all of which preceded the arrival of the steamer, it would be necessary if reconsignment or diversion was requested to take the matter up with the Railroad, which had possession of the document, and arrange a diversion with them. Obviously it would be necessary to recover the way bill and make the necessary change in it. The Railroad as a party to the through contract was a necessary factor in the diversion. There was no reservation in this respect in the Steamship

Company. The Steamship Company's Dock Superintendent only testified: "We would have endeavored to have a diversion" (R. 47). Question of diversion would not arise in absence of request from shipper or consignee. The Steamship Company had no right to initiate diversion.

III. Concerning Policing

The fact that the Steamship Company policed the wharf is also advanced as negativing delivery. The testimony is that the shipments were policed by the Steamship Company "in part" (R. 51). The written agreement between the Wharf Company and the Steamship Company provides that the Steamship Company shall "pay the salaries of sufficient police watchmen to protect the property hereinabove described, and also pay its pro rata of the expense of one day and one night police sergeant". The Steamship Company used the wharf also for its local business in which the Wharf Company had no interest, and it was appropriate enough in the circumstances for the Wharf Company to require the Steamship Company to pay a portion of the expense of policing. It does not appear whether the police watchmen were retained by the Wharf Company or the Steamship Company but only that the Steamship Company agreed to pay their salaries, and it does appear inferentially that the Wharf Company was to pay watchmen at least in part. The whole subject of policing ws evidently a general one, having no reference to the responsibility for any particular shipment on the wharf.

IV. Concerning Salvaging

It is also advanced as a circumstance negativing delivery that the Steamship Company attended to the salvage after the fire. Like the other intentions, this seems like

grasping at a straw. The Steamship Company, regardless of responsibility for the through shipments, had other shipments and property affected by the fire in which it was interested or for which it was responsible. The Galveston Wharf Company piers were destroyed in the fire (R. 57), and much property in which the Steamship Company was not interested must have been involved. Apparently some loaded cars were burned (R. 76). It was necessary that some one should undertake the salvage. Salvage service is properly undertaken by anybody even a stranger and imports nothing as to the salvor's relationship to the property.

V. Concerning Notice of Readiness

It is also asserted that notice from the Steamship Company to the Wharf Company that the shipment had been put in order and stamped ready to go was required as a condition of delivery. The testimony is that the shipment had been placed in the designated territory and put in order and that the Railroad Company's inspector had supervised the putting in order and stamped his O. K. on the packages as ready to go. This was at least notice by the Railroad Company as the principal to the Wharf Company as its agent. All the other shipments were loaded out without any notice from the Steamship Company, including two adjacent carloads for the same Railroad Company. The testimony is that after the O. K. no further action by the Steamship Company was expected.

These several circumstances were considered by the Courts below. They have no greater bearing than the immaterial circumstances mentioned in the cases we cite in our Second Point at pp. 20-22, *supra*.

FOURTH POINT

THE WHARF COMPANY IN RECEIVING DELIVERY FROM THE STEAMSHIP COMPANY ACTED EITHER AS THE AGENT OF, OR AS A SUB-CONTRACTOR FOR, THE RAILROAD COMPANY AND THE STEAMSHIP COMPANY WAS BY SUCH DELIVERY RELIEVED OF FURTHER RESPONSIBILITY IN RESPECT OF THE SHIPMENT.

Assuming delivery, it is immaterial to the Steamship Company whether the Wharf Company was an agent or a sub-contractor. It is the view of the Steamship Company that it was one or the other.

In *Missouri Pacific Railroad Company* v. *Reynolds, Davis Grocery Company*, 268 U. S. 366, the through bill of lading designated the Missouri Pacific as the delivering carrier. At destination its line did not reach the place of delivery of the shipment and it delivered the same to the St. Louis and San Francisco to complete the transit and make the delivery, paying a tariff charge to the latter for such service. The St. Louis and San Francisco was not named in the through bill of lading and did not receive any part of the joint through rate. It was held to be the "agent" of the Missouri Pacific for the purpose of making the delivery. Possibly the opinion uses the word "agent" in the broad sense of a representative such as a sub-contractor. The case at bar is not distinguishable in principle from this decision. The Railroad Company was party with the Steamship Company to a joint through bill of lading under a through rate requiring the Steamship Company to deliver at Galveston and the Railroad Company to receive the shipment there as the connecting carrier. The Steamship Company was not a land carrier and the Railroad

Company must therefore, in order to perform its contract, arrange for a connection with the water line. The Railroad Company did not connect immediately with the water line, but the Wharf Company's railroad provided a connecting link. It therefore employed the Wharf Company for the latter's tariff charge to receive delivery for it from the Steamship Company at the wharf in order to enable it to perform its contract. As in the *Missouri Pacific* case the Wharf Company was not named in the bill of lading and did not receive any part of the joint through rate (R. 66, 68).

Under the *Missouri Pacific* decision the delivery by the Steamship Company to the Wharf Company was delivery to the Railroad Company in accordance with the bill of lading and the Steamship Company was by such delivery relieved of responsibility.

Even if the Wharf Company was a common carrier and performing a common carrier service at the time, it was performing such service as the agent or subcontractor of the Railroad Company.

LAST POINT

IT IS RESPECTFULLY SUBMITTED THAT THE DECISION OF THE SUPREME COURT OF TEXAS SHOULD BE AFFIRMED WITH COSTS IN SO FAR AS IT RELIEVES THE STEAMSHIP COMPANY FROM LIABILITY.

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